Supreme Court, U.S.
FILED
APR 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-601

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

MARIE LUCIE JEAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Equal Access to Justice Act (EAJA) generally requires the government to pay reasonable attorneys' fees to a prevailing party in a civil non-tort action if "the position of the United States" was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). Respondents contend that the term "the position of the United States" is limited to the position taken by the government at the merits stage of a lawsuit, and does not include the position taken by the government at the fee stage of that action. That interpretation of the EAJA, respondents argue, is compelled

by the text of Section 2412(d)(1)(A), which refers to "*the* position" of the government, by the absence of any express reference in the Act to successive "stages" or "phases" of the action, and by the fact that the court when resolving a fee request must consider the agency's position upon which the civil action was based.[1]

The text of the EAJA, however, is not as single-mined as respondents claim. Indeed, the definition of "the position of the United States," on which respondents lay such stress, contradicts their basic assumption that the Act contemplates only *one* position. To paraphrase the Court's decision in *Pierce* v. *Underwood*, 108 S. Ct. 2541, 2549 (1988), the text of the Act permits, and sound policy counsels, the conclusion that the term "position of the United States" includes the position taken by the government at the fee stage of an action.

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[1] Respondents also renew their argument, first made in their brief in opposition, that we waived the question presented in the petition. Resp. Br. 48-49. As we explained in our reply brief at the petition stage (at 1-3), that claim is meritless. First, we raised the issue in the district court and preserved it in the court of appeals. See Gov't C.A. Br. 53-54; Gov't C.A. Reply Br. 21-24. The statement of the district court, Pet. App. 85a, on which respondents rely, Resp. Br. 48, read in context means only that we did not challenge the *amount* of fees claimed for the fee stage of the litigation, which is distinct from objecting to any award of fees for fees. (Significantly, elsewhere in their brief respondents agree with our interpretation of the district court's statement, see Resp. Br. 44 & n.28.) Second, contrary to respondents' claim, Resp. Br. 49, it was unnecessary for the government to introduce evidence that its position at the fee stage was reasonable. The relevant issues, for example, whether respondents' counsel were entitled to an enhancement of the fee award for emotional hardship, presented questions of law, rather than fact.

1. To begin with, the Act recognizes that the fees portion of a civil action may be separate from the merits stage. For example, Section 2412(d)(1)(B) provides that a party seeking a fee award must submit an application within 30 days of a final nonappealable judgment (including a settlement), 28 U.S.C. 2412(d)(2)(G). That provision obviously contemplates that a fee request may not be resolved as part of the original proceedings. Other provisions of the Act also contemplate that the court may conduct a hearing over a fee request. Section 2412(d)(1)(B) requires the fee applicant to "itemize[]" his sought-after costs, and Section 2412(d)(2) requires the court to find that attorneys' fees are "reasonable." In sum, the text of the EAJA obviously recognizes that there may be a separate fee stage of the civil action.

At that stage, the court must resolve several issues before awarding a party attorney's fees. Those issues typically involve matters such as whether the fee applicant was a prevailing party, whether the fee application is timely, whether the claimant meets the statutory requirements for a fee award, whether the number of hours spent in the litigation on the merits have been adequately documented and are otherwise reasonable, and whether there are special factors that justify exceeding the $75 hourly fee cap. None of those issues will have been considered in the court's decision on the merits. But even if the only question at the fee stage is whether the government's position on the merits was "substantially justified," that question, too, is not identical to the one resolved at the merits stage, which is whether the government's position was correct. See *Pierce* v. *Underwood*, 108 S. Ct. at 2550.

Moreover, this Court's decisions have also recognized that the fee stage of a case is separate from the merits and "raises legal issues collateral to the main cause of action." *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451 (1982) (holding that a request for attorneys' fees under 42 U.S.C. 1988 need not be filed within the ten-day period set by Fed. R. Civ. P. 59(e)). See also *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265, 267 (1988) (quoting *White* and holding that an award of costs under Fed. R. Civ. P. 54(d) is separate from the merits); *FCC* v. *League of Women Voters*, 468 U.S. 364, 373-374 n.10 (1984) (issue of entitlement to attorney's fees and costs described as "wholly collateral" to judgment on the merits). Compare *Osterneck* v. *Ernst & Whitney*, 109 S. Ct. 987 (1989). As this Court explained in *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. at 451-452:

> Section 1988 provides for awards of attorney's fees only to a "prevailing party." Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from the other elements. Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensable for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial.

Two consequences follow. First, when a party seeks attorneys' fees for the fee stage of the case, that stage must be part of "the civil action for which

fees and other expenses are sought," 28 U.S.C. 2412(d)(1)(B), or else that party could not obtain such fees.[2] Second, by expressly requiring the court to resolve such issues before awarding fees, Congress required the government to take a "position" on them at the fee stage of a suit, and that position is also part of "the position taken by the United States in the civil action," 28 U.S.C. 2412(d)(2)(D). The structure of the Act therefore requires that "the position of the United States" includes the position it takes at the fee stage of the litigation. If that is the case, then by the express terms of the Act fees for fees cannot be awarded unless the position of the United States at that stage was not substantially justified.

The careful balance Congress sought to achieve in enacting EAJA, see Pet. Br. 18-21, also suggests that the position of the United States at the fee stage of the litigation may not be deemed irrelevant. Congress could have simply authorized a court to award a reasonable attorney's fee (or a set fee) to any prevailing party. Instead, Congress chose a "middle ground," H.R. Rep. No. 1418, 96th Cong., 2d Sess. 14 (1980), in order to encourage parties to vindicate their legal rights without chilling government officials from vigorously discharging their responsibilities. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (1985); S. Rep. No. 253, 96th Cong., 1st Sess. 6 (1979). Among those responsibilities is "the conduct of litigation in which the United States, an agency, or officer thereof is a party," 28 U.S.C. 516, which is

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[2] Compare *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). If the term "civil action" includes the fee stage, as we have argued, the term "the position of the United States" should be read to apply to that stage of the action, since the text of the Act links the two terms.

vested in the Department of Justice. Lawyers for the government thus have a fiduciary duty to take reasonable positions on issues that arise in fee litigation in order to avoid needless burdens on the federal treasury. Congress cannot lightly be assumed to have intended to chill the government's ability to fulfill its fiduciary duty to the agency involved and the public. Cf. *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2256 (1989). In fact, some of those issues (*e.g.*, whether there is present a "special factor, *such as* the limited availability of qualified attorneys for the proceedings involved," 28 U.S.C. 2412(d)(2)(A) (emphasis added)) can only be hammered out in fee litigation, since Congress left them for the courts to decide in each case, or over time. Given this setting, there is no sound reason to deem reasonable positions taken by the government in EAJA fee litigation "second class citizens" undeserving of the same treatment afforded the government's position at the merits stage of a case.

It is no answer to say, as respondents do, Resp. Br. 32-33, that other sections of the EAJA may accomplish the same purpose as the substantial justification provisions. The provisions on which respondents rely authorize a court to reduce a fee award if a prevailing party has "unduly and unreasonably protracted the final resolution of the matter in controversy," 28 U.S.C. 2412(d)(1)(C), or for "any portion of the litigation in which the party has unreasonably protracted the proceedings," 28 U.S.C. 2412(d)(2)(D). Those provisions serve the purpose of allowing a court to sanction *a prevailing party* for obstructive or dilatory tactics, and thereby to deter such actions by others. By contrast, the substantial justification requirement was designed to ensure

that *the government* could take reasonable positions, before and after an action is filed, in order to carry out government policies and protect the public fisc. See Pet. Br. 19 (quoting Senate and House Reports). The provisions of the EAJA cited by respondents do not play the same role in the scheme of the Act as the substantial justification requirement.

2. Respondents and amici rely heavily on the 1985 reenactment and amendment of EAJA, in which Congress provided that the term "the position of the United States" under EAJA "includ[es]" the underlying agency action upon which the litigation was based. Resp. Br. 34-41; National Organization of Social Security Claimants' Representatives (NOSSC) Br. 8-12. As we explained in our opening brief (at 22-25), however, neither the text nor the legislative history of that amendment is inconsistent with our interpretation of the EAJA. Indeed, it undermines respondents underlying view that the government takes only one position in the course of any litigated dispute.

The 1985 amendment resolved a conflict among the circuits on a different issue: namely, whether, in determining a party's entitlement to a fee award in the first instance, which turns on the reasonableness of the government's position *on the merits*, a court was to consider the underlying government action that led to the litigation, or only the government's litigating position. The amendment defined the term "position of the United States" as the agency action leading to the suit "in addition to" the government's position in the lawsuit, 28 U.S.C. 2412(d)(2)(D), in order to ensure that a party could recover fees if the government decided not to defend in court that

agency action.[3] The phrase "in addition to" clearly does not limit the "position of the United States" to only the underlying action taken by the agency. In fact, because the EAJA covers all civil non-tort actions, the Act will apply in cases in which there is no underlying agency action. In such cases, only the government's litigation position can be considered in making the fee determination. The 1985 amendment thus does not require that the court eschew any inquiry into the reasonableness of the government's position at the fee stage just because the "position of the United States" at that stage is limited to its position in court.

Respondents and amici contend that the 1985 amendment shows that there should be an automatic award of fees for fees whenever the government's unjustified position on the merits has caused a fee claimant to litigate: Since the government has unjustifiably caused a claimant to be in court in the

[3] That limited purpose is demonstrated by the legislative history of that amendment, which refers to the circuit split, specifically identifying cases dealing only with entitlement to fees for the merits phase of the case. H.R. Rep. No. 120, 99th Cong., 1st Sess. 11-12 (1985). Only one of the 13 cases to which the Report refers, *Greenberg* v. *United States*, 1 Cl. Ct. 406, 407 (1983), even mentions an application for attorneys' fees for the fee request, and in that case the court refused to make an EAJA award at all, so the fees for fees issue was not addressed.

The limited purpose of the new requirement is also evident from the Act itself, which contains that requirement in Section 2412(d)(1)(B), the provision specifying the requirements for filing a fee application in the first instance. At that point in the proceedings, it would, of course, be impossible to determine whether the government's position in the fee litigation, which is initiated by the filing of the fee application, will be substantially justified.

first place, they argue, the government must pay all the fees resulting from that improper action. But the fee litigation does not stem from unreasonable government litigation in the same way that litigation on the merits stems from the underlying agency action. The litigation results from the claimant's own actions in formulating the fee request. Thus, there is an independent intervening cause of the additional litigation. As long as the government's position in the fee litigation is reasonable (as defined by *Pierce*), there is no reason to require the government to pay the claimant's fees incurred therein.

The fundamental defect in respondents' argument is the assumption, Resp. Br. 29-31, that there is only *one* government "position" in the case, so that once a court has determined that "it" was not substantially justified, there is no need (or warrant) to reconsider that determination, or make another one. In fact, this assumption is refuted by the very statutory definition they rely upon. The statute itself, 28 U.S.C. 2412(d)(2)(D), specifies that the "position" includes at least two positions: the "position taken by the United States in the civil action" *and* the "action or failure to act by the agency upon which the civil action is based." Thus, the statute itself requires that "*the* position" means "positions."

Moreover, if "the position" were read to mean "the *one* position," and if that position cannot be the government's litigating position (as respondents insist), then the only relevant inquiry under EAJA would be whether the underlying agency action was substantially justified. But if that were the rule, it would mean that so long as the underlying agency position was reasonable, the government could never be held liable for EAJA fees, no matter how unreasonable its position in court might be. Clearly, this is

not what respondents want, or what Congress contemplated.

Congress wanted individuals to be able to challenge the government whenever it took a "position" that was not substantially justified. If an agency took an unreasonable position, Congress wanted the individual to be able to overturn that action in court. If the government took an unreasonable position in court, Congress wanted the individual to be able to defeat that position. By the same token, if the government takes an unreasonable position with respect to the relief to be awarded, or on appeal, or in separate litigation over attorneys fees, Congress wanted the individual to be able to resist these distinct "position[s]." But there is no indication that Congress contemplated that once the government had taken an unreasonable position in agency action, a claimant would be entitled to fees for any and all litigation that might be spawned by that action, no matter how many twists and turns it might take and no matter how reasonable the government's position at ensuing stages of the litigation might be.

There is nothing anomalous about reading "the position of the United States" to mean "the position of the United States in the relevant stage of the litigation." Just as the determination that the government was wrong on the merits does not mean that its position was unreasonable, *Pierce* v. *Underwood*, 108 S. Ct. at 2550, so, too, the determination that the government lacked a reasonable basis for believing that its position on the merits was correct does not mean that any opposition to any fee request is also necessarily unreasonable. As we explained in Point II of our opening brief (at 31-34), the government may have a reasonable basis for opposing an applicant's request for a fee in excess of the fee cap (here,

for instance, the government prevailed on three of four such objections) even if the court were to determine that the government's position on the merits was not "substantially justified." The latter conclusion therefore says little about whether the government's position on the discrete issues in the fee stage was substantially justified.[4]

In short, neither the text of that amendment nor its underlying purpose answers the quite different issue posed by this case: whether the government must automatically pay a party's attorneys' fees for the fee stage of a case, even if the government reasonably opposes a fee request, simply because the government must pay such fees for the merits stage of the action. If, as we submit, "the position of the United States" includes the government's position at the fee stage of a case, the government can be required to pay fees for fees only if its position in the fee litigation is not substantially justified.[5]

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[4] Respondents allege that "[t]he principles enunciated in" *Sullivan* v. *Hudson*, *supra*, "compel" the conclusion that the EAJA requires the automatic award of fees for fees whenever the government's position on the merits is not substantially justified. Resp. Br. 43. See also NOSSC Amicus Br. 12 (suggesting that *Hudson* requires that the term "civil action" in EAJA include the entire action). That contention overlooks the Court's analysis in *Hudson*, 109 S. Ct. at 2253-2256, which turned on the particular provision of the Social Security Act, 42 U.S.C. 405(g), governing judicial review of agency benefit determinations, a provision that the Court characterized as "somewhat unusual," 109 S. Ct. at 2254. The narrow focus of *Hudson* on Social Security remand decisions is inconsistent with respondents' attempt to read that decision as mandating a broad interpretation of terms of the EAJA that were not remotely involved in that case.

[5] Relying on the fact that the President vetoed the original version of the 1985 reauthorization of the EAJA, Amici Na-

3. Respondents contend that our interpretation of the Act is inconsistent with its purposes, Resp. Br. 41-43, and rests on a "spurious" understanding of its policies, Resp. Br. 43-46, but they support that claim by oversimplifying those purposes and by overlooking one of its two policies. Respondents claim that the

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tional Immigration Project, et al., contend that the 1985 Act was rewritten to meet the President's concern by limiting a court's inquiry to the agency record. Amici therefore conclude that the requirement that the record upon which the substantial justification determination is based "includ[e] the record with respect to the action or failure to act by the agency upon which the civil action is based," 28 U.S.C. 2412(d)(1)(B), shows that the substantial justification determination is limited to the agency record. Br. 24-25. That argument lacks merit.

The President was concerned with the possibility that an agency official could be required to disclose his mental processes. In his veto message, the President observed that inquiring into the substantial justification of the underlying agency action "could lead to extensive discovery of how the underlying agency position was formulated, and who advocated what position and for what reasons at what time. * * * Such extensive discovery could inhibit free discussion within an agency prior to any final agency policy decision or action for fear that any internal disagreement or reservations would be the subject of discovery and judicial inquiry." Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. of Pres. Doc. 1814, 1815 (Nov. 8, 1984). Cf. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) ("it [is] not the function of the court to probe the mental processes of the [agency decisionmaker]"). Amici's argument also proves too much. It would be impossible to resolve the questions that arise in the course of the fee litigation solely on the basis of the record in the agency action and the merits stage of the litigation. That record will not even disclose the number of hours expended in the litigation, still less the reasonableness of that expenditure of time, both of which are fundamental elements in any determination of an appropriate fee award.

EAJA's sole concern was to encourage persons aggrieved by government actions to vindicate their rights through litigation. But if that were true, Congress would have enacted an automatic fee-shifting statute. It did not; instead, Congress adopted a more balanced approach, providing for the award of fees only when the government's position is not substantially justified in order to allow the government to take reasonable, even if ultimately unsuccessful, positions, both before and after a lawsuit is filed. The Senate and House Reports, which were quoted in our opening brief (at 18-19), make that point.

Our interpretation of the Act maintains that balance. If the government's position at the merits stage is not "substantially justified," a prevailing party will recover reasonable attorneys' fees for the cost of vindicating his rights at that stage. If the government's position at the fees stage also is not "substantially justified," a party also will recover reasonable attorneys' fees for the cost of litigating the fees issues. In either case, the government will be free to maintain reasonable positions without taxing the public fisc.[6]

4. Finally, our interpretation of the Act will not spawn the ceaseless fee litigation that respondents

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[6] Given some confusion by respondents and amici on the matter, see Resp. Br. 42, it perhaps bears emphasis that we do not argue that if the government is substantially justified in opposing a fee request, the government is thereby absolved from liability for EAJA fees for the litigation on the merits. Our contention is that if the government takes a reasonable position (as defined by *Pierce*) at the fee stage of the case, the government should not be liable for attorneys' fees for the fee litigation itself. For that reason, amicus NOSSC is mistaken in fearing, see NOSSC Br. 19-20, that, under our interpretation of the Act, parties who request only a small amount of attorneys' fees risk losing their entire fee award.

predict and that some lower courts have feared. In many cases the court reviewing a fee request will be able to resolve at one hearing whether the government's position on the merits was "reasonable * * * both in law and fact" under *Pierce*, 108 S. Ct. at 2550; if it was not, whether the fees requested for the merits phase are "reasonable" under *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); and (whatever answers the court gives to those issues) whether the government's opposition to the fee application also was reasonable under the *Pierce* standard. A reviewing court would then have the benefit of those determinations, and also could resolve all three in one proceeding if it were necessary to do so. Even before *Pierce* held that such determinations are reviewed under the abuse-of-discretion standard, 108 S. Ct. at 2549, 2553, there was no evidence of an "infinite regression" of fee proceedings in those circuits that did not automatically award fees for fees. Accordingly, that prospect should not be dispositive.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1990

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